Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE
UNITED STATES
**********

No. 75-1194
**********

JACK SHOUSE, DAVID ROMER,
E. A. BAXENDALE, AND
ALICE M. BAXENDALE,

Appellants,

vs.

PIERCE COUNTY, a political subdivision of the State of Washington, CLAY HUNTINGTON, PATRICK J. GALLAGHER, and GEORGE P. SHERIDAN, County Commissioners,

Appellees.
**********

# MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM
**********

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Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

---

MOTION TO DISMISS OR,
IN THE ALTERNATIVE, TO AFFIRM

---

COMES NOW Pierce County, Washington, and the Board of County Commissioners, the Appellees herein, being represented by the

Pierce County Prosecuting Attorney, by Joseph D. Mladinov, Special Counsel thereof, and respectfully moves the United States Supreme Court to dismiss this action or, in the alternative, to affirm the judgment for dismissal entered on November 7, 1975, in accord with the opinion dated November 6, 1975, of the District Court of the United States for the Western District of Washington, sitting as a three-judge statutory court.

## I.
## OBJECT OF THE MOTION

The Motion to Dismiss is based upon the following:

A. The federal question sought to be reviewed was not timely raised.

1. The state statute of limitations bars this challenge.

2. In the alternative, the doctrine of laches bars this action.



The Motion to Affirm is based upon the following:

A. The federal questions were thoroughly briefed, presented and argued before the three-judge federal court and do not merit further argument.

B. The Appellants' claim is so unsubstantial as to not merit further argument.

## II.
## FACTS ON WHICH MOTION TO DISMSS OR, IN THE ALTERNATIVE, AFFIRM, ARE BASED

By this action four residents and electors of Pierce County, Washington, challenge the validity, under the equal protection clause of the 14th Amendment, of one provision of a comprehensive Washington statute relating to the construction and operation of sanitary sewer facilities by counties. The remedies sought are declaratory relief and a permanent injunction.

The statute permits counties to construct and operate sewer facilities, and authorizes alternative financing methods. One method is the formation of utility local improvement districts, in which the real property is assessed commensurate with the benefits which the real property will receive from the development of a public sewer system. Assessments can be used to pay all or part of construction costs.

The executive and legislative branch of Appellee Pierce County's government is a popularly elected three-member board of county commissioners. All of the Appellants are equally qualified with other residents of the county to vote for members of that board, and all did so except one who chose not to.

Under the challenged state legislation a utility local improvement district can be formed in either of two ways. If owners of 51% or more



of the land in a proposed district petition for its formation, the popularly elected board of county commissioners may either grant or deny the petition; their decision is final. Alternatively, the proposal can be initiated by the board. In the instant case the popularly elected board, following public hearings at which plaintiffs appeared and testified, unanimously resolved to form the district in issue. That district encompasses a suburban area of about 20,000 acres and 75,000 residents. The board also resolved to finance part of the construction costs of the proposed sewage collection and treatment system by assessing real property in the district, proportionate with the benefit each parcel would realize as a result of the system's construction. Half or more of the costs would, however, be paid by federal and state grants. The board's decision to pay part of the construction costs by special

assessments triggered the operation of the statutory provision under attack here, that being Section 36.94.240, Revised Code of Washington:

> The jurisdiction of the commissioners to proceed with any improvement initiated by resolution shall be divested by protests filed with the clerk of the board prior to said public hearing signed by the owners, according to the records of the county auditor, of at least forty percent of the area of land within the proposed local district.

Contrary to representations appearing in Appellants' Jurisdictional Statement, no "election" has ever been held to decide whether the district should be formed, nor have Appellants ever been denied the right to vote in any election. What did happen is that an insufficient number of property owners filed protests, as contemplated by the statute; accordingly, the popularly elected board was not "divested of its jurisdiction to proceed." Appellants complain that, not being owners of assessed property, they lacked standing under



the statute to file protests.

The general statute, of which RCW 36.94.240 is a part, has provisions akin to those in all states pertaining to the assessment of land to pay costs of local public works improvements. Such assessments differ from general ad valorem property taxes in many material ways. They are essentially charges against land specifically benefited by a public works improvement. If not paid, they create forecloseable liens. As is true of special assessment statutes in all states, the Washington statute accords standing to owners of assessed land to assert certain rights which members of the public at large do not share. Owners are entitled, for example, to challenge in court the premise that their land will actually benefit from the improvement in an amount equal to the assessment it will bear. Another right extended to the owners

is that of preventing the assessment method of financing to be used at all, in the manner described in the quoted provision. Resolution No. 16500 which established the assessment district only directed acquisition of property and construction of facilities to begin. Said resolution levies no taxes, fixes no charges, authorizes no bonds. These latter actions can be taken by a Washington county by the popularly elected board of commissioners and are not subject to any formal protest mechanism other than judicial review which is available without regard to land ownership. (RCW 36.32.330)

Appellants were allowed to present all the evidence they could muster to persuade the three-judge District Court of their proposition that, not being owners of assessed land, they were deprived of equal protection because they could not protest the district's formation. For reasons



described hereafter, the court found it unnecessary to discuss at length the questions so posed. The court considered them, however, and concluded:

> As indicated, we do not reach the constitutional questions. If we were to decide them, however, we would resolve them against plaintiffs. On the issue of non-landowners' rights Field v. Barber Asphalt Paving Co., 194 U. S. 618, 621 (1904), would be controlling, and not the election cases cited by plaintiffs. The weighted vote question would be governed by Salyer Land Co. v. Tulare Lake Basin Storage District, 410 U. S. 719, 734 (1973).

[Jurisdictional Statement, A-9.]

BRIEF IN SUPPORT OF MOTION
TO DISMISS

## I. THE STATE STATUTORY LIMITATION PERIOD IS APPLICABLE

The comprehensive Washington statute governing county sewer construction and operation provides alternative mechanisms, as noted above, for forming utility local improvement districts by which real property can be assessed. The provision heretofore quoted (RCW 36.94.240) goes on to say:

> No action whatsoever may be maintained challenging the jurisdiction or authority of the county to proceed with the improvement and creating the utility local improvement district or in any way challenging the validity thereof or any proceedings relating thereto unless the action is served and filed no later than thirty days after the date of passage of the resolution ordering the improvement and creating the local district.

Pierce County's resolution 16500, creating the district in issue, was passed June 18, 1973.



This action was commenced September 5, 1973.

The three-judge district court correctly analyzed the application of the state statute of limitations to this action. Even had the court applied an alternative method of analysis, the result would have been the same.

Where the action is brought based upon a federally created right or statute, and there is no federal statute of limitations, then the appropriate state statute of limitations is applicable. International Union v. Hoosier Cardinal Corp., 383 U. S. 696 (1966). In Henry v. Ordorloso, (C.A. Pa.) 385 F.2d 491, cert. den. 390 U. S. 1016, reh. den. 391 U. S. 929 (1967), it was held that since 42 USC 1983 contains no statute of limitations (of its own) governing civil rights actions, the federal courts will apply the appropriate state statute of limitations. 42 USC 1983 is pled as the jurisdictional statute in this action.

The Appellants cite Holmberg v. Armbrecht, 327 U. S. 392 (1946), as the general rule for authority to abandon the state statute of limitations when a federal equitable remedy is requested. 2 Moore's Federal Practice, § 307(3) at p. 753-754 interprets the Holmberg case to be slightly clarified by Cope v. Anderson, 331 U. S. 461 (1947). Thus, where the equitable remedy sought is concurrent with one at law and not one solely available in equity, the federal courts will apply the same limitations as applicable in state court. At bar, Appellants seek an injunction and declaratory relief, the former being equitable and the latter being neither equitable nor legal but sui generis. Therefore, the limited rule which Appellants rely on is not applicable here because the equitable remedy sought, an injunction, is not available solely in a federal equity court but would also be available in a state court. Appellants have



filed in federal court apparently only in an attempt to evade the state statute of limitations.

## II. IN THE ALTERNATIVE, THE FEDERAL DOCTRINE OF LACHES BARS THIS ACTION

It is well known that even if a state statute of limitations is not applicable, a federal court may apply it by analogy or use it in determining whether the plaintiff has inexcusably slept on his rights. Zsaplicki v. The Hoegh Silver Cloud, 351 U. S. 525 (1956), and Holmberg v. Armbrecht, 327 U. S. 392 (1946).

The Appellants offered no excuses at all for their failure to timely file this action other than neglect of their original attorney. Appellee, Pierce County, because of a State Department of Ecology directive issued on August 27, 1973, which modified the septic tank ban and ordered Pierce County to enter into engineering design contracts, has since the 5th day of September,

1973, entered into said contracts. The county has also entered into contracts for preparation of an environmental impact statement and has proceeded to attempt to arrange state and federal funding to assist with this project. Pierce County has been and will be extremely prejudiced if this case is not immediately terminated. Pierce County, state and federal agencies are anxiously awaiting the final decision on this matter in order to finalize grants which are necessary to begin construction on the first phases of this project.

The Appellants failed to prove that Pierce County would not be prejudiced because of their lack of timely filing this action. As cited by the district court opinion, the rule in several federal circuits is to place the burden on plaintiff to prove the lack of prejudice to the defendant.



## III. THE APPELLANTS ARE NOW IMPROPERLY RAISING A NEW ISSUE

Appellants failed to raise the issue that RCW 36.94.240 denies equal protection of the law because it does not fairly classify persons to whom it applies. This issue was not raised during the course of the district court trial, and it should be prohibited here. Hiawassee River Power Co. v. Carolina-Tennessee Power Co., 252 U. S. 341 (1919).

Arguendo, on the surface, this issue is without merit. RCW 36.94.240 provides that "No action whatsoever may be maintained . . ." The limitation applies to all prospective plaintiffs, and its protection is a practical necessity to protect the formation process of a special assessment district.

The Appellants imply that a 30-day statute of limitations is unreasonably short. The reasonableness of the time set forth in a statute of

limitations is determined by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice. Wilson v. Iseminger, 185 U. S. 55 (1902).

## IV. THE ELECTION CASES ARE NOT APPLICABLE TO THE DIVESTMENT PROCEDURE UTILIZED IN THE SPECIAL ASSESSMENT DISTRICT FORMATION PROCESS

While the district court opinion did not expound on the issue of the applicability of the election cases and the weighted vote question, by dicta the judges expressed how they would decide and what cases governed.

These issues were squarely presented to the district court, were fully briefed and argued and do not merit further judicial attention. The special assessment procedures and formation



process are deeply rooted, and to permit four appellants who have failed to prove substantial hardship or injury but only possible injuries or supposed injuries (if the assessment is partially or wholly passed on to them), to tie up this court's time, is not justified.

## CONCLUSION

For the foregoing reasons, this action should be dismissed or, in the alternative, the district court's decision affirmed.

Respectfully submitted,

By

JOSEPH D. MLADINOV,
Special Counsel to the
Prosecuting Attorney of
Pierce County, Washington,

Of Attorneys for Appellees